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Property

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CLOSING PUBLIC ROADS AND STREETS

In the absence of comprehensive legislation, the courts have used statutes of limited application to develop a system of principles to govern the closing of public roads and streets by governmental entities. The supreme court in *Coliseum Square Association v. New Orleans*[1] further unified the rules in this area. In allowing the city to close off one block of a street in an urban area, the court continued the trend to allowing local governments substantial discretion in these matters.

Statutory Provisions

Louisiana Civil Code provisions do not address the problem of closing public roads and streets. The code simply classifies things, including roads and streets, as common, public, or private.[2] Roads and streets may be public or private things, and may or may not be subject to public use.[3] The soil underneath may be owned by private persons, by the state, or by political subdivisions of the state. To the extent the civil code provides that public streets are public things subject to public use, the use it guarantees is nonetheless only "in accordance with applicable laws and regulations."[4] Most important, nothing in the state constitution or the civil code prohibits the government from reclassifying roads and terminating the public's use of them.

Given the absence of general legislation on closure, some guidance comes from a few specific statutes and from general principles of local government law. In fact, the problems in the cases arise from the closure of streets by municipalities and police juries. The state's powers over its highway system are more clearly established.

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1. 544 So. 2d 351 (La. 1989).
2. La. Civ. Code arts. 448-460.
3. La. Civ. Code art. 457:

   A road may be either public or private.

   A public road is one that is subject to public use. The public may own the land on which the road is built or merely have the right to use it.

   A private road is one that is not subject to public use.
4. La. Civ. Code art. 452.

The State's Powers

Louisiana Revised Statutes 48:224[5] allows the secretary of the Department of Transportation & Development to abandon sections of the state highway system that "cease to be used by the public to the extent that the original purpose is no longer being served."[6] The statute requires notice to local governing authorities and public utilities, and gives the local governing bodies an opportunity to take over the road and make it a part of its road system. If the public use is to terminate, the statute allows the secretary to sell the land involved by public or private sale. Private sales, however, are limited to sales to the original vendor who sold the property to the state, or to that vendor's successors in title. Underlying this provision is the policy of reconsolidating narrow strips of land into the contiguous tracts from which they were carved, thus avoiding the formation of hard-to-develop odd-shaped tracts of land. This policy is also reflected in the recent cases involving termination of use of irrigation canals. Courts deciding these cases have stretched conveyancing language to find intent to convey servitudes rather than full ownership to canal companies, thus fostering the reconsolidation of the old, narrow canal properties into the adjoining estates.[7]

Of course, in the case of a servitude for a road or street, abandonment of the right would simply extinguish that real right and allow the landowner to return to full enjoyment of his property.

Little litigation has arisen under the statute, and it seems that the secretary has substantial discretion whether to abandon a stretch of road or not.[8] Formal abandonment is also required before ownership transfers. Failure to comply with the requirements for abandonment has also been used to support a determination that the state was not freed from tort liability arising out of its ownership and control of the old road.[9] Louisiana Revised Statutes 48:224(E) does contemplate freeing the state from tort responsibility; it specifically provides that if a road is properly

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5. As amended by 1985 La. Acts No. 489, § 1.

6. La. R.S. 48:224(A) (Supp. 1989).

7. See, e.g., Porter v. Acadia-Vermillion Irrigation Co., Inc., 479 So. 2d 1003 (La. App. 3d Cir. 1985), writ denied, 483 So. 2d 1019 (1986). See also Heirs of Primeaux v. Erath Sugar Co., Ltd., 484 So. 2d 717 (La. App. 3d Cir. 1986). The recent cases reflect earlier policies applied in older railroad right of way cases. See, e.g., Rock Island, A. & L. R. Co. v. Gournay, 205 La. 125, 17 So. 2d 8 (1944); Hunter Co. v. Ulrich, 200 La. 536, 8 So. 2d 531 (1942); Noel Estate v. Kansas City Southern & Gulf Ry., 187 La. 468, 175 So. 468 (1937).

8. Lamartiniere v. Daigrepont, 121 So. 2d 585 (La. App. 2d Cir. 1960); Lamartiniere v. Daigrepont, 168 So. 2d 373 (La. App. 3d Cir. 1964).

9. Gayle v. Dept. of Highways, 205 So. 2d 775 (La. App. 1st Cir. 1967), writs refused, 251 La. 932, 933, 934, 207 So. 2d 538, 539 (1968) (road was rerouted and bridge over canal was dismantled; auto drove into canal; no notices of danger were posted).

abandoned, "The department shall have no further obligation or liability in connection with the servitude." Indeed, the problems in this area can involve potentially conflicting policies—the policy of protecting the public's use of necessary roads and the policy of freeing the local governments from liability related to roads it cannot effectively maintain. Recent legislation ameliorating the tort liability of local government entities for damages caused on roads may make that policy a less important concern in this area.[10]

Local Government Powers

Home rule charter provisions governing termination of the public use of streets will govern if that power is not denied by general law and there exists no conflict with the state constitution or the state's police power.[11] Local governments without home rule charters may, after a vote of their citizens allowing it, exercise any function not denied by general law.[12] Other local governments have the powers provided by law. In any case, the analysis must begin with the state statutes that relate to these matters.

Of long standing are the provisions of Louisiana Revised Statutes 48:701,[13] which allow local governments, except New Orleans, to "revoke and set aside the dedication of all roads, streets, and alleyways laid out and dedicated to public use." They may do so when the streets "have been abandoned or are no longer needed for public purposes." Upon the revocation, ownership of the land under the former street goes to the contiguous landowners "up to the center line thereof." The Orleans home rule charter contains a similar power without providing for the title consequences upon termination.[14] A more general statute is Louisiana Revised Statutes 33:4712(A), which allows any municipality to sell or lease immovable property "not needed for public purposes." More flexibility to sell or exchange any immovable property, including roads and

10. La. R.S. 9:2800(B) provides in part that "no person shall have a cause of action based solely upon liability imposed under Civil Code article 2317 against a public entity for damages caused by the condition of things within its care and custody unless the public entity had actual or constructive notice of the particular vice or defect which caused the damage prior to the occurrence, and the public entity has had a reasonable opportunity to remedy the defect and has failed to do so." La. R.S. 9:2800(B) (1985 La. Acts No. 454, § 1).

11. La. Const. art. VI, §§ 5(E), 9. See Justice Dennis' dissent on original hearing in Coliseum Square Assoc. v. City of New Orleans, 544 So. 2d 351, 355 (La. 1989).

12. La. Const. art. VI, § 7.

13. Derived from 1938 La. Acts No. 382, §§ 1, 2, and 4 and 1910 La. Acts No. 151.

14. See *Coliseum Square*, 544 So. 2d at 359.

streets, is given to East Baton Rouge Parish when the property is "no longer needed for public use."[15]

Limitations on Terminating the Public Use—The Need Standard

It is arguable that Louisiana Revised Statutes 48:701 applies only to those "roads, streets, and alleyways" that became dedicated to public use under Louisiana Revised Statutes 33:5051 by recordation of subdivision plats.[16] The courts, however, have applied the same standard to roads that became public by virtue of three-year maintenance under Louisiana Revised Statutes 48:491(B)(1). In *Coliseum Square Association v. New Orleans*,[17] the supreme court applied the same standard to the home rule city of New Orleans. This wider application of the standard—to all terminations of public use regardless of how the road became public and regardless of the entity involved—would seem to be supported by a policy of statewide uniformity and consistency. It is also consistent with the standard applicable to the state. The inquiry here is, first, whether the road or street has *in fact* been abandoned. If so, the formal termination of the public use can then proceed. If actual abandonment has not occurred, the issue is whether the road or street is "no longer needed for public use." This is a flexible inquiry involving factual as well as legal questions and in which the courts tend to defer to the local governmental authority.

Limitations on Termination of Public Use—The Cases

In *American Security Bank v. Rebokus*,[18] decided this term, the court refused to allow the rural village of Pine Prairie to revoke the dedication of part of an alley that had been dedicated by the filing of a subdivision plat. Concerned about the tort exposure resulting from its ownership of such property acquired as a result of dedication, the village council abandoned all public alleys in the village. Included in the revocation was an alley behind a bank building, one regularly used by bank customers to travel from the bank's drive-in window to a nearby street. The Third Circuit Court of Appeal concluded that the facts did not support a finding that the alley was "no longer needed for public purposes." Property owners adjacent to the alley testified to "weekly and daily" use of the alley, and approximately 150 bank customers wanted to keep the access to the drive-in window. It did not

15. La. R.S. 48:711-719 (1984 & Supp. 1989).

16. Compare the similarity of the wording: roads, streets and alleyways; also dedication. La. R.S. 48:701 and 33:5051 (1984).

17. 544 So. 2d 351 (La. 1989).

18. 527 So. 2d 71 (La. App. 3d Cir. 1988).

appear from the evidence that an alternative route was available. Although the court's conclusion that the alley was needed would have been sufficient to dispose of the case, the court continued its analysis and also added that the action of the village was "arbitrary and capricious." One could certainly argue that freeing itself and its taxpayers from tort liability was a rational basis for action by a municipality, and thus not arbitrary or capricious as an abstract proposition. However, the court's emphasis in the opinion, mirroring the emphasis in the statute, is on the need for the road. It is true that much discretion is given to the municipality in these matters, and the use of the "arbitrary and capricious" standard is more a reflection of the notion that the political decision will be given some measure of correctness.[19]

Rebokus continues a line of jurisprudence in which it has been established that current substantial use of a street or road, plus no existence of an alternate route, is sufficient to prevent a municipality from abandoning a street or road.[20] In such cases, the test of no longer being needed for public use is not met. The fifth circuit court of appeal in *Central Metairie Civic Association v. Jefferson Parish*[21] did permit abandonment of seldom used two-lane streets accompanied by a developer's agreement to construct a four-lane public road nearby. The third circuit, in *Bulliard v. Delahoussaye*,[22] also permitted abandonment of a dedicated street that was not used by the public but was used as a driveway by lot owners. There, abandonment resulted in the inaccessibility of one small tract; "However, there is no house on this property and it does not produce income; in fact the only evidence of the use

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19. That language can be traced to Caz-Perk Realty v. Police Jury, 207 La. 796, 22 So. 2d 121 (1945). Here again, though, the use of the arbitrary and capricious formula was not in an abstract sense, but in the sense of whether the road was used or not, and whether it was needed or not. It probably would be more precise to refer to the rule simply in terms of the statute—the dedication can be revoked if the road is abandoned or no longer needed for public use. Once that principle is applied to a given set of facts by a municipality or police jury, the courts, in exercising judicial review, will give much discretion to the executive body. Only if that decision as to abandonment or need is shown to have been arbitrary or capricious will it be overturned. Arbitrary is used in the sense of disregarding the evidence or its proper weight; capricious is used in the sense of a conclusion contrary to substantiated competent evidence. See Torrance v. Caddo Parish Police Jury, 119 So. 2d 617 (La. App. 2d Cir. 1960).

20. "In fact, our research discloses no case upholding the abandonment of an established and well-maintained road, and certainly not where that road constitutes the only means whereby an abutting landowner may enter or leave his property." Luneau v. Avoyelles Parish Policy Jury, 196 So. 2d 631 (La. App. 3d Cir. 1967); A. Yiannopoulos, Property § 70, in 2 Louisiana Civil Law Treatise (1980).

21. 484 So. 2d 706 (La. App. 5th Cir. 1986). The case is ostensibly concerned with road abandonment, but that was only a means of opposition to a shopping center development.

22. 481 So. 2d 747 (La. App. 3d Cir. 1985).

of [the tract] is . . . sporadic visits for yard maintenance." The enclosed lot, in that case, would be entitled to a servitude of passage for private use by the landowner, but not to public use.[23]

A more complex problem involving a dense urban setting was raised in *Coliseum Square Association v. New Orleans*.[24] The supreme court allowed the city to terminate the public's use of one block of a street used by more than 500 vehicles per day where alternative routes were available; but only after rehearing and by vote of 5-2, reversing the original judgment that was reached by a 4-3 vote.

The case did not involve a city's power under Louisiana Revised Statutes 48:701 to revoke dedications. The court found the city's power to terminate the public use in its general home rule powers and Louisiana Revised Statutes 33:4712(A), which authorizes leases of public property "not needed for public purposes." Nonetheless, the court appears to apply the same standards as under § 701, relying in large part on *Caz-Perk Realty*,[25] which did involve § 701. The court also refers to the traditional rule that the decision of the political body that the street is no longer needed will stand if it is not arbitrary or capricious.

Opponents of closure relied in large measure on the argument that the street is "needed" because it was being used by pedestrian and vehicular traffic. However, the court concluded,

> The mere fact that the street is being used by the public does not mean that it is "needed" for public purposes. "Use" and "need" are relative terms and it is the duty of the Council, after reviewing and weighing the evidence presented, to determine whether discontinuance of the present use and any inconvenience resulting therefrom would outweigh whatever benefits would flow from the closure of the street.[26]

The considerations supporting the closure were strong, especially the interest in the safety of young school children. The one block of Chestnut Street at issue ran between property owned on both sides by a church corporation, and on which was conducted a church school for 400 students in pre-kindergarten to eighth grade. Academic buildings were located on one side of the street, with playgrounds, gymnasium, and

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23. La. Civ. Code art. 689: "The owner of an estate that has no access to a public road may claim a right of passage over neighboring property to the nearest public road. He is bound to indemnify his neighbors for the damage he may occasion."

Bulliard can presumably be reconciled with *Rebokus* in that the former involved "private" use by a small class of persons and that the latter involved large numbers of the general "public." Neither opinion considers this problem at length.

24. 544 So. 2d 351 (La. 1989).

25. 207 La. 796, 22 So. 2d 121 (1945).

26. 544 So. 2d at 360. See also Justice Lemmon's dissent on original hearing, id. at 355.

athletic fields on the other. Even before the school authorities sought to close the street to unify the campus, the street had been closed to the public from 10:00 a.m. to 2:30 p.m. each school day. The court stated, "The permanent closure of the block will not create a dead-end street, will not deprive any property owners of access to their property, and should not impede the access of emergency vehicles to the neighborhood residents."

The case also demonstrates full procedural consideration of the alternatives by local government entities—consultants studying the traffic flow; neighborhood meetings; planning commission hearings; city council hearings.

The supreme court's opinion on rehearing leaves the jurisprudence moving in the same direction as it had been, and rejects the position, espoused on original hearing, that a municipality could close a street "only when the street was not used by the public."[27] The final decision allows closure of streets that are in use if adequate alternate traffic routes are provided and the governmental interests supporting the closure are strong enough. Child safety near schools emerges as such a strong interest. In an urban area, alternate streets will almost always be available.

Effect of Revocation of Dedications

In *Walker v. Coleman*,[28] the second circuit court of appeal had to contend with an apparent conflict between Louisiana Revised Statutes 33:4711, which allows police juries to "sell or exchange . . . any property" no longer needed for public purposes, and 48:701, which, upon revocation of dedications of "roads, streets and alleyways," provides for ownership of the property to go to "the then present owner or owners of the land contiguous thereto" to the center line of the street. In *Walker*, the police jury of Ouachita Parish[29] attempted to sell for $6,100 the area of an undeveloped street that had been dedicated by filing a plat of a subdivision. Apparently, the governmental entity sold all the street property to a contiguous landowner on the north side of the street, to the exclusion of the contiguous landowner on the south side.

The court in *Walker* viewed the conflict as one between a general statute dealing with all property and a more specific one treating the special problems of streets. "As a special law, [the latter] takes prec-

27. Id. at 353.

28. 540 So. 2d 983 (La. App. 2d Cir. 1989).

29. La. R.S. 48:711-719 (1984 & Supp. 1989) is inapplicable to Ouachita Parish because its population is less than 325,000.

edence. . . ."[30] Underlying Louisiana Revised Statutes 48:701 is a policy of encouraging a return to consolidated, coherent tracts of land when a residential subdivision ceases to be used as such or is never developed. While the facts of this case might not be inconsistent with that policy, since the sale would have been to one adjacent landowner, the application of Louisiana Revised Statutes 33:4711 to streets would allow the municipality or police jury to sell the narrow street plots to anyone and could seriously interfere with the recombination policy.

MOVABLES & IMMOVABLES

The effective date for immobilization by declaration of machinery and equipment was determined by the supreme court in *City of New Orleans v. Baumer Foods, Inc.*[31] Under Louisiana Civil Code article 467, four requirements must be met to qualify for such immobilization, and the court reasoned that the change in classification does not occur until all four requirements are met. The requirements are: 1. unity of ownership of the host immovable and the appliances serving the host; 2. the host immovable cannot be a private residence; 3. the equipment must be placed on the immovable for its service and improvement; and 4. a declaration of the owner's intent to immobilize the equipment must be recorded in the conveyance records. In *Baumer Foods*, the equipment was placed in a food processing plant over a period of several months, but the declaration was not registered until May 7, 1985. Only upon that filing were all the requirements met and the equipment transformed into an immovable component of the building in which it was placed. Until that time, the equipment was movable property equivalent to the tangible personal property which is subject to use tax by the city of New Orleans.

If the declaration were to be filed first, and the equipment placed in a manufacturing establishment afterwards, it would seem under the same reasoning that the effect of immobilization would not arise until all requirements are met. In such a case, it would seem that the date of placement would be the crucial time at which immobilization occurs. In the event of the placement and declaration coming first with respect to equipment in a private residence that is then converted into a business establishment, the time of conversion would be the time that all four elements are met and that the classification change takes place. This approach, which seems required by the text of the statute, does pose some problems in that it makes it difficult to rely on the recorded declaration to ensure that immobilization has in fact occurred. The

30. 540 So. 2d at 986.
31. 532 So. 2d 1381 (La. 1988).

placement and the lack of a residential destination are matters that must be determined outside of the public records.

The problem of recorded declarations failing to reflect the actual classification also arises when the equipment is no longer in use on the immovable property. Though Louisiana Civil Code article 467 provides for immobilization by declaration, it does not address the mechanics of deimmobilization. No procedure is established for removing or revising the declaration in the public records. Article 468, however, seems to provide rather clearly that deimmobilization occurs upon terminating the service relationship to the host building, upon transfer and delivery to good faith acquirers, or upon detachment or removal. It does not require removal of the declaration.

Tax laws applicable to "tangible personal property" also provided the background for *Sales Tax Collector v. Westside Sand Co.*[32] The court held that sand kept at a lumber yard and sold to customers was subject to the sales tax. It is true that while in place (apparently in the bed of the Mississippi River) the sand was part of a tract of land and thus a component of an immovable. Once detached, however, it became a movable under the terms of Louisiana Civil Code article 468.[33] As such, it was equivalent to tangible personal property referred to in the sales tax statute. The taxpayer had relied on dictum from *Landry v. LeBlanc*[34] that suggested that "topsoil did not become movable by its placement in trucks to be hauled away." The fifth circuit found that such a conclusion was "fallacious" and held that the sand was subject to the sales tax.

In a more traditional case, *American Bank & Trust v. Shel-Boze, Inc.*,[35] the court held that "light fixtures and related electrical paraphernalia, and carpeting" were components of a residence. The dispute was between the holder of a mortgage on land, on which a contractor constructed two residences, and the suppliers of electrical appliances and carpet for the residences. Since the latter items had become immobilized as components, they were subject to the mortgage, and the acts of the suppliers in removing them were improper, making them liable for damages to the bank.

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32. 534 So. 2d 454 (La. App. 5th Cir. 1988), writ denied, 536 So. 2d 1240 (1989).

33. La. Civ. Code art. 468:

> Component parts of an immovable so damaged or deteriorated that they can no longer serve the use of lands or buildings are deimmobilized.
>
> The owner may deimmobolize the component parts of an immovable by an act translative of ownership and delivery to acquirers in good faith.
>
> In the absence of rights of third persons, the owner may deimmobilize things by detachment or removal.

34. 416 So. 2d 247 (La. App. 3d Cir. 1982).

35. 527 So. 2d 1052 (La. App. 1st Cir. 1988), writ denied, 532 So. 2d 155 (1988).

The court construed Louisiana Civil Code article 466 much the same way as did the United States Court of Appeals for the Fifth Circuit in *Equibank v. United States*[36]—as encompassing the "societal expectations" of reasonable persons as to components of contemporary houses. Those expectations would include wired-in lighting fixtures, as in *Equibank* and "finished flooring, such as carpeting."

Perhaps the most interesting aspect of the case is what the court did not do. It did not go into the details of how the materials were attached and how easy or difficult physical detachment would be. The emphasis was more on the policy concerns about contemporary notions as to components of residences, and was in the direction of inclusion of items as components, rather than exclusion.

Shel-Boze and *Equibank* are consistent with the trend in this area of the law. They reflect Judge Tate's opinion in *Lafleur v. Foret*, in which he referred to "contemporary views as to conceptions of components in light of current house construction practices."[37] In this development, the law has finally caught up with current building technology with respect to components of residences, and moved away from old cases that allowed virtual denuding of houses upon sale. Ironically, however, building technology and practices with respect to commercial buildings has been changing. Often, a developer of commercial property simply builds a shell and the tenant completes the space with walls, flooring, carpeting, and furniture. To approach these commercial buildings with the same approach as the residential cases may thwart the underlying policy of having the law here reflect contemporary practices. A different approach to commercial buildings, one that allows fewer items to be considered components than with residences, may be the path of future development.

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36. 749 F.2d 1176 (5th Cir. 1985).
37. 213 So. 2d 141, 148 (La. App. 3d Cir. 1968).